

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: April 17, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re 3B Medical, Inc.*  
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Serial Nos. 88948110 and 88953956  
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Timothy C. Bradley of Carlson, Gaskey & Olds, P.C.,  
for 3B Medical, Inc.

William H. Dawe, III, Trademark Examining Attorney, Law Office 108,  
Kathryn Coward, Managing Attorney.

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Before Kuhlke, Lykos, and Coggins,  
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

3B Medical, Inc. (“Applicant”) seeks registration on the Principal Register of the  
mark FREEDOM X in standard characters and in the following stylization with

design , both for “cannulas for oxygen  
concentrators for medical applications,” in International Class 10.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88948110 (the standard character mark) was filed June 4, 2020, and  
Application Serial No. 88953956 (the composite word-and-design mark) was filed June 8,  
2020, each under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon  
Applicant’s allegation of a bona fide intention to use the marks in commerce. Application

The Trademark Examining Attorney refused registration of each application under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the cannula goods identified in the application, so resembles the standard character mark OXLIFE FREEDOM for "oxygen concentrators for medical applications," in International Class 10,<sup>2</sup> on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

After the Trademark Examining Attorney made the refusals final, Applicant appealed to this Board. The appeals were consolidated, then suspended at Applicant's request pending determination of whether a declaration of use under Trademark Act Section 8 would be filed in the cited registration.<sup>3</sup> See 15 U.S.C. § 1058 (requiring declarations of use or excusable nonuse no later than the sixth anniversary after the date of registration).<sup>4</sup> After the Office accepted and acknowledged Registrant's Combined Declaration of Use and Incontestability under Sections 8 and 15, the Board

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Serial No. 88953956 contains the following statements: "The mark consists of the phrase 'Freedom X' in rounded letters, with the letter 'X' including two semicircles," and "[c]olor is not claimed as a feature of the mark."

<sup>2</sup> Registration No. 5026929, issued August 23, 2016. Section 8 accepted, Section 15 acknowledged.

<sup>3</sup> 8 TTABVUE (consolidation); 12 TTABVUE (suspension). Because the file histories of the two marks are almost identical, we refer to the record and appeal in application Serial No. 88948110. Citations to the briefs on appeal refer to the Board's TTABVUE docket system; citations to the prosecution record refer to the USPTO Trademark Status and Document Retrieval system (TSDR) in the downloadable .pdf format. See *In re Integra Biosciences Corp.*, 2022 USPQ2d 93, at \*7 (TTAB 2022).

<sup>4</sup> See also TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1604.04 (2022) ("If an applicant requests suspension based on the possibility that the cited registration may be cancelled for failure to file an affidavit of continued use, the Board will grant such request if the Board acts on the request after the 5th anniversary of the issue date of the registration.").

resumed the appeals.<sup>5</sup> We now take up the appeals and affirm the Section 2(d) refusal to register in each application.

### I. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d).

Our determination under Section 2(d) involves an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*,” setting forth factors to be considered and referred to as “*DuPont* factors”) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to the *DuPont* factors depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the

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<sup>5</sup> 13 TTABVUE (resumption).

goods . . . because the ‘fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.’” *In re Embiid*, 2021 USPQ2d 577, \*10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). See also *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). Applicant argues only the first factor, while the Examining Attorney argues the first, second, and third factors. We analyze these factors, below.

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent consumer confusion as to source and to protect registrants from damage caused by registration of similar marks likely to cause such confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); see also *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. Similarity of the Goods, Trade Channels, and Classes of Purchasers

“We begin with the second and third *DuPont* factors, which respectively consider ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’ and ‘the similarity or dissimilarity of established, likely-to-continue trade channels.’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*19 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) and *DuPont*, 177 USPQ at 567). We compare the goods as they are identified in the involved application (i.e., cannulas for oxygen concentrators for medical applications) and cited registration (oxygen concentrators

for medical applications). *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at \*3 (citing, inter alia, *Detroit Athletic Co.*, 128 USPQ2d at 1052).

The Examining Attorney argues that the goods are complementary because they are used together and purchased by the same consumers for the same purpose; specifically, Applicant's cannulas are used with Registrant's oxygen concentrators for medical applications.<sup>6</sup> To demonstrate the relatedness of the goods, the Examining Attorney submitted, inter alia, evidence from third-party medical supplier websites that show the goods are used together and sold together to the same consumers. *See, e.g.*, Angel Medical Supply, and Preferred Health Choice which offer medical oxygen concentrators and cannulas therefor; and TTLife which sells medical oxygen concentrators packaged with a nasal cannula.<sup>7</sup>

We find the goods inherently related and complementary on the face of the respective identifications, in that cannulas for oxygen concentrators for medical applications are necessarily used with oxygen concentrators for medical applications – at the same time, by the same consumers. *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002) (holding that the respective identifications of goods were, themselves, evidence as to the relatedness of the parties' goods and extrinsic evidence of relatedness was not per se required); *cf. Kellogg Co. v. Gen. Mills Inc.*, 82 USPQ2d 1766, 1770-71 (TTAB 2007) (addressing acquired distinctiveness Board noted that close relationship between the goods in

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<sup>6</sup> 6 TTABVUE 13-14.

<sup>7</sup> March 10, 2021 Office Action at 12-13 (angelmedicalsupply.com), 44-45 (phc-online.com), and 47-49 (oxygenconcentrator.shop).

prior registration and later application may be self-evident from the respective identifications). *See also, e.g., In re Cook Medical Techs. LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012) (catheters and guiding sheaths used therewith closely related; “[i]f goods are complementary in nature, or used together, this relatedness can support a finding of likelihood of confusion.” (citing *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984)); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (medical MRI diagnostic apparatus and medical ultrasound devices are related, based in part on the fact that such goods have complementary purposes and may be used by same medical personnel on same patients to address same medical issue).

Because neither identification includes any restriction regarding channels of trade or classes of purchasers, we must presume that these respective goods travel through all usual trade channels for such goods and are offered and sold to all of the usual customers for those goods, including those seeking use of the goods for medical applications. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000) (“When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade.”); *see also In re Joel Embiid*, 2021 USPQ2d 577, at \*31.

Our findings are confirmed by the third-party medical supplier websites referenced above which demonstrate that the goods are sold and used together. *See In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*5-6 (TTAB 2020); *In re Anderson*,

101 USPQ2d 1912, 1920 (TTAB 2012); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203-04 (TTAB 2009). Moreover, Applicant effectively concedes that the second and third *DuPont* factors support a finding of a likelihood of confusion by not addressing the similarity or dissimilarity of the goods or trade channels in its brief. *See In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

We thus find that the *DuPont* factors of the relatedness of the goods, channels of trade, and classes of purchasers favor a finding of likelihood of confusion.

#### B. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entirety, considering their appearance, sound, connotation, and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019).

Applicant's marks are both FREEDOM X, one in standard characters and one

stylized as . The cited mark is OXLIFE FREEDOM in standard characters.

The Examining Attorney argues that the word FREEDOM is the dominant portion of Applicant's marks, and that the shared word FREEDOM which appears in Applicant's and Registrant's marks stimulates the same mental reaction and creates the same commercial impression in each mark, suggesting "the condition of being free."<sup>8</sup> Applicant, on the other hand, argues that the marks sound different and present substantially different connotations and commercial impressions. Specifically, Applicant contends that the letter X in Registrant's mark produces a harsh sound, while in Applicant's mark it is much softer; the word FREEDOM in Registrant's mark connotes freedom **from** something, while in Applicant's mark it means freedom **to do** something; and, in Applicant's words, the overall commercial impression of Registrant's mark "calls to mind the life of oxen (i.e., castrated male cattle) or perhaps life insurance," while Applicant's marks call to mind "excitement, adventure, and/or cutting edge goods/services . . . ."<sup>9</sup>

Determining the dominant portion of Applicant's marks is straightforward because the word FREEDOM is the first (and only) word in the marks. *See Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered[.]"). *See also Palm Bay Imps.*, 73 USPQ2d at 1692. In Applicant's standard character mark, FREEDOM is followed by the letter X which may be perceived in any number of minor ways such as a letter, symbol, roman

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<sup>8</sup> 6 TTABVUE 7, 10-11. *See also* March 10, 2021 Office Action at 7, definition of "freedom" from the FREE DICTIONARY (freedictionary.org).

<sup>9</sup> 4 TTABVUE 3-4; 9 TTABVUE 4-5.

numeral, etc. In the stylized version of the mark, it is not certain that the two semi-circles would even be perceived as the letter X or anything other than a simple mirrored arc design.

Identifying a dominant portion of Registrant's mark OXLIFE FREEDOM, on the other hand, is not as straightforward. In the context of oxygen concentrators, it is likely that OXLIFE will be perceived as the suggestive combination of "oxygen" and "life." The nature of the term OXLIFE in Registrant's mark "counsels against a reflexive application of [the] principle" that the first part of a mark is generally its dominant portion. *Sabhnani*, 2021 USPQ2d 1241, at \*37 (finding that the word MIRAGE was the more significant portion of the respondent's ROYAL MIRAGE word mark) (citing *Stone Lion Cap.*, 110 USPQ2d at 1161)). We find the word FREEDOM of slightly more import in Registrant's mark because, as described in more detail below, FREEDOM is significant in creating the overall commercial impression of this mark.

There is no question that the marks share the word FREEDOM which has the same sound and appearance within each mark. We acknowledge, however, that when considering the marks as a whole, the additional term OXLIFE in the cited mark lends an overall additional sound and appearance to that mark which is not present in Applicant's mark. Nonetheless, this distinction is insignificant because the display of Registrant's and Applicant's standard character marks is not limited to any particular font style, size, or color, we must consider that both marks might be used in any stylized display, including the same or similar lettering style or color. *See In*

*re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-10 (Fed. Cir. 2012); *Citigroup*, 98 USPQ2d at 1259; *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1886 (TTAB 2018) (literal elements of standard character marks may be presented in any font style, size or color). Similarly, we must consider that Registrant's mark may be used in a stylized display the same or similar to that in Applicant's stylized mark. *See, e.g., In re Viterra Inc.*, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display.”). The similarity in appearance of the marks as a whole is enhanced due to the shared word FREEDOM and the appearance of the letter X in each mark – as the second element of Applicant's marks and as part of the first element of Registrant's mark.

As to the sound of the entire marks, we are not persuaded by Applicant's contention that the pronunciations of the X portions within the marks are so very different. Accepting Applicant's argument that the X in OXLIFE would have the pronunciation of the X in “ox,” “fox,” and “box,” and that the X portion of Applicant's mark would have the pronunciation “ex,” we find the X-sounds similar – but with slightly differing leading vowel sounds. Although the marks in their entireties have differences in sound (e.g., LIFE does not appear in Applicant's mark), they also have similarity (the X consonants) and identity (the word FREEDOM) in sound.

Turning to the connotation and commercial impression of the marks, we observe that FREEDOM means “the condition of being free; the power to act . . . without

externally imposed restraints.”<sup>10</sup> In the context of the inherently and closely related, complementary goods (i.e., oxygen concentrators for medical applications and cannulas therefor), there is no evidence to support Applicant’s argument that FREEDOM would have a different connotation, however slight, in each mark. The third-party medical suppliers’ website evidence adduced by the Examining Attorney is helpful to demonstrate the connotation of FREEDOM in each mark, in line with the dictionary definition of the power to act without restraint. As the Preferred Health Choice website explains, its products feature “lightweight maneuverability.” Its medical oxygen concentrators “are compact, lightweight, unobtrusive and provide [consumers] with the [oxygen they] need anytime and anywhere. . . . remove the need to deal with heavy cylinders . . . [and] resolve the problem with travel restrictions on airplanes . . . .”<sup>11</sup> Similarly, the Oxygen Concentrator Supplies Shop’s “mission is to keep you mobile, active, and free to enjoy daily living,” and to meet that mission it carries “a wide variety of accessories to keep you active, mobile and always ready to travel.” Its “technology is giving patients on oxygen the opportunity to travel again.”<sup>12</sup> When considered in context with the goods, FREEDOM in each mark connotes the same thing: the condition of being free, and particularly having power to act and travel without the restraint of being tethered to a heavy, stationary, at-home oxygen cylinder.

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<sup>10</sup> March 10, 2021 Office Action at 7 (freedictionary.org).

<sup>11</sup> March 10, 2021 Office Action at 44, 46 (phc-online.com).

<sup>12</sup> March 10, 2021 Office Action at 14, 30 (oxygenconcentratorsupplies.com).

This same connotation of FREEDOM in each mark creates an overall highly similar commercial impression of the marks. The trailing letter X does nothing to alter the meaning of FREEDOM in Applicant's marks, and, moreover, it is not certain that the two semi-circles in the stylized version of the mark would even be perceived as the letter X or anything other than a mirrored arc design.<sup>13</sup> Further, the stylized word-and-design mark is presented with minimal stylization that does not create a separate commercial impression from the wording in the mark. Similarly, the additional term OXLIFE in Registrant's mark does not change the connotation of FREEDOM. Instead, it further enhances the meaning by suggesting the very nature of the goods. As mentioned above, in the context of oxygen concentrators it is likely that the OX portion of OXLIFE will be perceived as "oxygen" instead of, as Applicant contends without evidence, a castrated male bovine animal – an ox. We find that the marks have highly similar commercial impressions due to the shared word FREEDOM.

Even considering the specific differences between the marks, and particularly the position of the differing additional matter in the marks, we find that the marks nonetheless are overall more similar than dissimilar due to the identical word FREEDOM which creates highly similar overall connotations and commercial impressions. The similarities in connotation and commercial impression are of ultimate importance because consumers are likely to perceive Applicant's and

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<sup>13</sup> To the extent the arcs may be perceived as mimicking the curves of a cannula, it suggests the nature of Applicant's goods.

Registrant's marks as designating product variations from the same source. Those familiar with Registrant's mark upon encountering Applicant's marks are likely to mistakenly believe that Applicant's marks represent a variation on the registered mark used to identify respiratory accessories emanating from a common source. *See, e.g., Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product."); *Cf. In re Toshiba Med. Sys. Corp.*, 91 USPQ2d at 1271 (TTAB 2009) (VANTAGE TITAN "more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices").

While we acknowledge the differences between the marks, the differences do not outweigh the strong similarities created by the identical word FREEDOM in the marks, or the connotation and overall commercial impressions engendered by the marks as a whole. This is particularly the case because the proper analysis is not a side-by-side comparison of the marks, but consideration of the recollection of the average customer who retains a general rather than specific impression of the marks. *See, e.g., i.am.symbolic*, 123 USPQ2d at 1748, (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

Accordingly, the first *DuPont* factor also favors a finding of likelihood of confusion.

C. Conclusion as to the Likelihood of Confusion

We have found the oxygen concentrators for medical applications and cannula therefor to be inherently and closely related, complementary goods which travel in at least overlapping trade channels to the same consumers who purchase and use the goods together. We have also found the marks to be overall more similar than dissimilar because they create highly similar commercial impressions. We therefore find that confusion is likely.

II. Decision

The refusals to register Applicant's standard character mark FREEDOM X and the stylized word-and-design mark  are affirmed.